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No. 88-1228

In the Supreme Court of the United States

OCTOBER TERM, 1988

JACKSON COUNTY, MISSOURI; WILLIAM WARIS, BERNICE J. CONLEY, GARY PANETHIERE, BEVERLY O. ROSS, MICHAEL PENDERGAST, ITS OFFICIALS,
Petitioners,

and

THE STATE OF MISSOURI, et al.,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, et al.,
Respondents,

vs.

KALIMA JENKINS, by her friend, KAMAU AGYEI, et al.,
Respondents,

and

AMERICAN FEDERATION OF TEACHERS, LOCAL 691.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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PETITIONER JACKSON COUNTY'S REPLY MEMORANDUM

Several respondents contend in their briefs opposing certiorari in this action and two others (Nos. 88-1150, 88-1194, and 88-1228) that this Court lacks jurisdiction to entertain these petitions, because petitioners did not file timely rehearing motions that would interrupt the running of the 90 day period in which a party may petition this Court for review by certiorari. Petitioner Jackson County wishes to respond to this point, as well as to suggest some new authority regarding the issue of judicial imposition of tax rates.

THE PETITION FOR CERTIORARI WAS FILED WITHIN THE TIME ALLOWING FOR SUCH

The rule governing the operation of rehearing requests where certiorari is asked for is that where a rehearing petition is filed before the time for a certiorari petition has expired, such filing tolls the running of the time, and the limitation period to initiate certiorari proceedings begins from the date of the rehearing petition's denial. *Pfister v. Northern Illinois Finance Corp.* (1942) 317 U.S. 144, 149 fn 7. The facts surrounding this petitioner's Court of Appeals' rehearing request brings this petition within that rule, and this Court does have jurisdiction to consider these certiorari requests.

The Court of Appeals panel rendered its decision on petitioner's appeal on the merits on August 19, 1988, see 855 F.2d 1295, 1296. Thereafter, petitioner filed its request for rehearing, which was captioned "Petition of Appellant Jackson County, Missouri for Rehearing by

Court En Banc". This filing was made within the 14 days provided for by Rule 40(a) of the Federal Rules of Appellate Procedure.

The rehearing petition addressed the merits of the decision as petitioner viewed them, asserting in particular that points of law were erroneously decided; that contrary to the panel's holding there was a want of authority in the District Court to impose taxes by judicial decision; that the court-ordered tax increase was unnecessary; that petitioner should have been allowed to intervene in the remedial action; and that the District Court should have refrained from entering an injunction because of 28 U.S.C. 1341. The petition asserted that these matters were also of such grave constitutional and exceptional public importance the Court of Appeals should reconsider them en banc.

After considering the rehearing requests, the Court of Appeals denied them on October 14, 1988, although two of the judges of that court dissented from this denial, stating they felt rehearing should be granted, see 855 F.2d at 1318; Pet. App. 60-61.

This petitioner thereafter, on January 12, 1989, filed its petition for certiorari in this Court, which was within the 90 day period after the denial of the rehearing petition by the Court of Appeals.

Prior to the January 12, 1989 date, this petitioner sought an extension of time from this Court in which to file its petition. The Clerk's Office responded in a letter dated January 3, 1989, advising that there could be no extension because the time for filing a petition had already passed. The rationale of that letter was that F.R.A.P. Rule 35(c) stated that a petition for re-

hearing en banc shall not affect the finality of the judgment of the Court of Appeals, and since the ruling occurred on August 19, 1988, the 90 days had already run.

Respondents appear to rely on this letter for their assertion that the certiorari petition was jurisdictionally out of time. They further argue that the nunc pro tunc order entered by the Eighth Circuit Court of Appeals on January 10, 1989, which clarified the ruling that the October 14th order was actually a denial of rehearing and rehearing en banc, can not provide jurisdiction.

The order of January 10, 1989 was not to provide jurisdiction because such already existed by virtue of the timely filing by petitioners of their respective rehearing petitions with the Court of Appeals within the 14 day period, as provided for by F.R.A.P. 40(a), and the decisional law, e.g. *Pfister*. The Court of Appeals order of January 10th only clarified the action originally taken by the Court of Appeals with regard to the various rehearing petitions, wherein it recalled the mandate issued on October 14, 1988, and entered the following order nunc pro tunc effective October 14, 1988: "There are three (3) petitions for rehearing with suggestions for rehearing en banc pending before the Court. It is hereby ordered that the petitions for rehearing and the petitions for rehearing with suggestions for rehearing en banc are denied". Such entries are employed to supply on the record something which has actually occurred, but has been omitted from the record by inadvertence or mistake. E.g. *Matthies v. Railroad Retirement Bd.* (C.A. 8, 1965) 341 F.2d 243, 246.

The order entered by the Eighth Circuit did nothing more than to correct the record to reflect the Eighth

Circuit's internal practice of treating suggestions for rehearing as petitions for rehearing before the original panel and, where so stated, as a rehearing en banc request as well. This practice by the Eighth Circuit is illustrated (as pointed out by the State of Missouri in its reply brief filed herein, see p. 3 fn 3), by such cases as *Green v. McDonnell Douglas Corp.* (C.A. 8, 1972) 463 F.2d 337, *vacated,* 411 U.S. 792 (1973); *Jenkins v. Missouri* (C.A. 8, 1988) 838 F.2d 260, *cert. granted,* ..... U.S. ....., 102 L.Ed.2d 209 (1988); *Brown v. Frey* (C.A. 8, 1986) 806 F.2d 801. It is also in accord with the interpretive notes by the Advisory Committee on Appellate Rules under F.R.A.P. 35, which clearly states for the guidance of the judiciary, bar and public that:

> "In practice, the suggestion of a party that a case be reheard in banc is frequently contained in a petition for rehearing, commonly styled *'petition for rehearing in banc'. Such a petition is in fact merely a petition for a rehearing, with a suggestion that the case be reheard in banc."* (Emphasis supplied). Reprinted in U.S. Code Annotated, at p. 254, under F.R.A.P. 35.

This is not a situation as that which occurred in such cases as *Dept. of Banking v. Pink* (1942) 317 U.S. 264, where a post-decision motion was filed in a state appellate court which did not seek a re-argument or rehearing of any part of the case but only sought a declaration as to what had occurred upon the previous decision of the appeal; nor is it like *F.T.C. v. Minneapolis Honeywell Co.* (1952) 344 U.S. 206, 210, where not only was the post-decision motion not denominated a rehearing motion nor one to amend the judgment, but "in no manner did it purport to seek such relief". The petitions filed here with the Court of Appeals clearly sought rehearing relief.

The rehearing petitions here sought a rehearing with the suggestion that the cause be heard en banc, on the merits, which is what the F.R.A.P. provides for in its Rules 35 and 40, and which must be read together with the rule set forth in *Pfister* that directs the tolling of the 90 day period in the event a rehearing petition is instituted. The corrected order entered on January 10, 1989 by the Eighth Circuit did nothing more than reflect the internal practice of the Circuit regarding rehearing petitions, and the manner in which the rehearing power of the Courts of Appeal is to be administered is left to those courts. *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.* (1953) 345 U.S. 247, 250. This petitioner's rehearing petition asked for rehearing relief because the panel's decision erroneously applied or misconstrued applicable law (Eighth Circuit Rule 15(a) on panel rehearings) and also raised questions of grave constitutional dimension or exceptional public importance, and contended that it directly conflicted with precedent (Eighth Circuit Rule 16(c) on en banc rehearings). The petitioner's rehearing request did toll the period for filing the certiorari request, and this Court may properly entertain the petition for certiorari review.

ADDITIONAL AUTHORITY ON THE ISSUE OF THE LACK OF AUTHORITY TO JUDICIALLY IMPOSE STATE PROPERTY TAXES

As one issue for certiorari review, petitioner contends that the District Court and Court of Appeals have unconstitutionally imposed a state tax by judicial order, in that there was no authority in the constitution or by statutory provision to permit them to increase a school tax rate above rates authorized by state law to remedy alleged discrimination.

On March 29, 1989, this Court decided the appeal of *Davis v. Michigan Dept. of the Treasury* (No. 87-1020), wherein it held that Michigan's tax scheme violated principles of intergovernmental immunity by discriminating in favor of retired state and local government retired employees over retired federal government employees in taxation of the latter's retirement benefits (Slip Opinion, pp. 1-13).

In the remedial phase of that decision (Part V, pp. 13-14), this Court was called upon to address the federal employee's request for prospective relief from discriminatory taxation. The employee's claim, it was stated, could be resolved either by extending the tax exemption for state and local government employees to retired employees (or to all retired employees), or by eliminating the state and local government exemption. "The latter approach, of course, could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court" citing *Moses Lake Homes Inc. v. Grant County* (Slip Opinion, pp. 13-14). It was then held that the permissibility of either approach was a question of state law within the special expertise of the Michigan courts, who were in the best position to determine how to comply with the Court's mandate of equal treatment. (Slip Opinion, p. 14).

In *Moses Lake Homes Inc. v. Grant County* (1961) 365 U.S. 744, this Court ruled a state tax constitutionally invalid because of its discriminatory nature, but also held that the federal courts did not as a consequence have any power to decree a valid tax. In that decision this Court concluded that the lower federal court's decision to direct the District Court to decree a

valid state tax for an invalid one which the State had attempted to exact was an invalid exercise of judicial authority because the District Court had no such power. "*Federal courts may not assess or levy taxes.* Only the appropriate taxing officials of Grant County may assess and levy taxes on these leaseholds, and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one." (Emphasis supplied). 365 U.S. at 752.

Under these holdings there is a lack of authority in the federal courts to impose state taxes in the absence of existing state law that permits the courts to raise or otherwise impose such taxes, and that the District Court in doing so here has acted beyond its authority.

The opinion of the Eighth Circuit panel which appears to keep the District Court from directly raising state taxes does not change the fact that the federal courts are in fact raising state taxes. The Eighth Circuit panel ruled that in the future, the District Court would by court order directly set the maximum rate to which the levy could be raised. The school board would choose a tax rate over that allowable by state law, and the District Court would enjoin the state and county from seeking to enforce state tax laws. *Jenkins v. Missouri* (C.A. 8, 1988) 855 F.2d 1295, 1314-15. The difference between what the District Court did by directly ordering tax increases, and what the Eighth Circuit panel authorized is merely a distinction without a difference. The substance of raising taxes over the amount authorized by state law, under the auspices of a federal

court, remains unchanged. Petitioner therefore again urges this Court to grant the certiorari request.

Respectfully submitted,

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